No. 21374

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROGER LEE GLAVIN, ROBERT LORING CHESNEY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal From the United States District Court
Central District of California.

BRIEF FOR APPELLANTS.

G. G. BAUMEN,
1950 Sunset Boulevard,
Los Angeles, Calif. 90026,
Attorney for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Jurisdictional Statement.

The pleadings and facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction to review the judgments and orders involved herein are:

1. Appellant Roger Lee Glavin was tried on an indictment returned by the Federal Grand Jury in Los Angeles, California, for violation of laws of the United States, that is, 18 U.S.C., Sec. 2312 in two counts and 18 U.S.C., Sec. 2314 in a third count, charging that in the months of March and April 1966 he transported in interstate commerce from Los Angeles, California to other states two trucks and a trailer (over the value of $5000) which he knew to have been stolen. [Clk. Tr. p. 2.]

2. Appellant Robert Loring Chesney was tried on an indictment, returned by the same grand jury, for violation of 18 U.S.C., Sec. 2 in two counts, charging that he aided and abetted Appellant Roger Lee Glavin in the commission of the two counts relating to transportation of the two stolen trucks in interstate commerce from Los Angeles to other states. [Clk. Tr. p. 2.]

3. 18 U.S.C.A., Sec. 3231 provides that the district courts of the United States shall have original jurisdiction of all offenses against the laws of the United States.

4. 28 U.S.C.A., Sec. 1291 provides that the courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, except where a direct review may be had in the Supreme Court.

Statement of the Case.

By indictment filed May 25, 1966 in the United States District Court, Central District of California [Tr. p. 2] Appellant Roger Lee Glavin was charged with violation of 18 U.S.C. Sec. 2312—transportation of motor vehicle in interstate commerce knowing the same to have been stolen—in two counts and violation of 18 U.S.C., Sec. 2314—transportation of stolen merchandise (refrigerated trailer) over the value of $5,000 in interstate commerce, which was known to have been stolen . . .—and Appellant Robert Loring Chesney was charged with aiding and abetting (along with another defendant, Leon Leroy Glavin) in the commission of the two counts of transporting vehicles in commerce knowing them to have been stolen, this in violation of 18 U.S.C., Sec. 2. [Tr. p. 2.]

Each of the appellants were arraigned on June 6, 1966 and pleaded not guilty to each count of the indictment. [Minute Order 6/6/66, Tr. p. 5.]

At the time for trial on June 27, 1966, and prior to the commencement thereof, a motion was made by counsel who represented both appellants to be relieved from representation of Appellant Roger Lee Glavin, that there appeared to be a conflict of interest between the two defendants, that Mr. Glavin did not agree on the manner of representation and did not wish the counsel to represent him, which motion was denied. [Supp. to Rep. Tr. pp. 1-2.]

A motion to suppress was filed on behalf of Appellant Roger Lee Glavin on June 27, 1966 [Tr. p. 11.] The motion was heard on June 28, 1966 and denied. [Rep. Tr. pp. 98-128.]

The case was tried before a jury from June 27, 1966 through June 30, 1966. [Rep. Tr. pp. 6, 19, 20, 21.]

At the conclusion of the Government's case, the following motions were made by counsel for appellants: (a) A motion to strike the evidence which had been subject to the motion to suppress [Rep. Tr. p. 545]; (b) A motion on behalf of Appellant Chesney to strike an exhibit admitted in evidence [Rep. Tr. pp. 545-546]; (c) A motion on behalf of Appellant Chesney to strike Government Exhibits 14, G., H. and I. on claim or partial entrapment and non-possession by Chesney; (d) and, a Motion for a judgment of acquittal on behalf of Chesney which motions were denied. [Rep. Tr. p. 554.]

Objection was made to the court as to a proposed jury instruction relating to possession of recently stolen property [Rep. Tr. p. 562, lines 10-11] which was

overruled, and after having been given by the court an exception was taken to such instruction. [Rep. Tr. p. 604, lines 12-14; p. 605.]

The jury returned a verdict of "guilty" as to each appellant as to each count charged. [Rep. Tr. p. 608, line 1 to, p. 609, line 8.]

A motion for Judgment of Acquittal and a Motion for a New Trial were filed on behalf of both appellants and heard on July 12, 1967, both of which were denied. [Tr. pp. 24, 26 and 29.]

Sentence was then pronounced as to each appellant, sentencing each of them to five years in prison as to each count with the sentences to run on each count concurrently, which judgments were filed on July 12, 1966. [Tr. pp. 30 and 31.]

Notice of appeal was filed on behalf of both appellants on July 13, 1966. [Tr. p. 32.] Both appellants were admitted to bail pending appeal.

Specification of Errors.

1. The court erred in denying the motion of appellant Roger Lee Glavin to suppress the evidence relating to the search, subsequent arrest and seizure of documents, log books, gasoline receipts, etc., which search and seizure was claimed to be unlawful and illegal, and the subsequent admission into evidence over objection of the products of such search and seizure.

The motion to suppress was filed on June 27, 1966. [Tr. p. 11.] The motion was made upon the ground that such documents, papers and written data were taken as a result of unlawful search and seizure and that they were seized without a warrant and prior to

the time that defendant was arrested and at the time of the search there was no reasonable or probable cause therefor. [Tr. p. 11; Rep. Tr. pp. 98-128.]

The documents were admitted into evidence over objection as Government's Exhibit 12-E (13 receipts) [Rep. Tr. p. 1222; Ex. 12-L (driver's logbook) Rep. Tr. p. 431, line 7, to p. 432, line 7; Ex. 12-M (driver's logbook) Rep. Tr. p. 434, line 3, to p. 435, line 7.]

(The motion to strike this evidence which was denied is part of the same specification of error.) [Rep. Tr. p. 545, lines 18-24.]

2. The Court erred in admitting in evidence Government Exhibit 9-A (a receipt for purchase of truck parts having the name "Chesney Truck" on it) [Rep. Tr. p. 298, lines 18-19; and p. 343, lines 10-19] over the objection of defendant Chesney that the same was hearsay, irrelevant and immaterial and no foundation was laid connecting the same with or identifying the same to this appellant. [Rep. Tr. p. 297, line 9, to p. 299, line 5; and p. 336, line 4, to p. 343, line 19.]

3. The court erred in admitting over objection on behalf of appellant Robert L. Chesney of incriminating identification plates and other materials [Exs. 14-B to 14-I] which were in the possession of the police and not shown to have ever been in the possession of Mr. Chesney which the police caused to be momentarily placed in the hands of defendant Chesney and thereupon simultaneously arresting him (his arrest being accomplished at the time when he was not in the commission of a crime, nor in connection with any matter which would show probable cause for such arrest) utilizing this police controlled evidence to create the

impression before the jury that defendant was connected with the crimes charged.

Objection was made that there was not sufficient foundation, that the procedure was in the nature of entrapment, that the evidence was irrelevant and immaterial and that there was no proper connection of Mr. Chesney therewith and that it was improper and prejudicial to introduce police possessed and controlled evidence for the purpose of incriminating appellant Chesney when there was no other foundation for showing his connection therewith other than the police ruse used to get the evidence into his possession and arrest.

(Objection to all the exhibits and Exhibit 14-B) (Truck license plate) [Rep. Tr. p. 491, line 8, to p. 495, line 23; Ex. 14-C] (manila envelope) p. 498, line 21, to p. 500, line 14; Ex. 14-D, 14-E and 14-F (Manila envelopes) p. 503, lines 10-16; 14-G (engine I D tag) p. 504, line 18, to p. 505, line 25; 14-H and 14-I (small metal tags for I D Plates) p. 509, line 16, to p. 510, line 7.]

4. The court erred in instructing the jury over the objection of defendants [Rep. Tr. p. 562, line 10, to p. 566, line 8—actual instructions contained on p. 596, line 20, to p. 598, line 25] (the instruction in effect nullified to a great degree the presumption of innocence and in a large measure the Constitutional right of a defendant not to testify and that such failure to testify could not be used against him) as follows:

> "Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surround-

ing circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

"And, possession of property recently stolen if not satisfactorily explained, is ordinarily a cricumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it was stolen property, but also participated in some way in the theft of the property . . ."

5. The court erred in denying the motion made prior to the commencement of trial to be relieved from representing appellant Roger Lee Glavin when it was brought to his attention that there appeared to be a conflict of interest between the two defendants Roger Lee Glavin and Robert Loring Chesney in the handling of their defense, that defendant Glavin was not able to agree with the counsel as to the manner in which counsel proposed to handle his defense and that Glavin requested that the counsel who was also representing Mr. Chesney not represent him and did not wish Mr. Chesney's counsel to represent him. [Supp. to Rep. Tr. pp. 1-2.] This was also urged on the trial court as a ground for the motion for a new trial. It is respectfully urged herein that by denying such motion the court deprived each of these appellants of the right of full representation and independent representation of counsel of their choice and in the manner of their choice as is and reasonably should be guaranteed by the Sixth amendment of the United States Constitution.

6. There was an insufficiency of the evidence to sustain the verdict and judgment as to either of the appellants. Especially is this true if the court excludes evidence objected to as hereinabove set forth.

7. The court erred in denying the motion to strike and motion for judgment of acquittal made at the conclusion of the Government's case. [Rep. Tr. p. 545, line 18, to p. 554, line 10.]

8. The court erred in denying the motion for a new trial and the motion for judgment of acquittal made on July 12, 1966. [Tr. pp. 24-26.]

Summary of Argument.

1. Appellants' Constitutional Rights Denied by Jury Instruction Given.

Appellants urged that the court by instructing the jury (over their objection) that possession of property recently stolen *if not satisfactorily explained* was a circumstance from which the jury *may reasonably draw the inference and find,* that the person in possession not only knew it was stolen, *but also participated in some way in the theft of the property,* impaired and in effect denied the rights guaranteed by the Fifth Amendment of the United States Constitution to in effect remain silent and to suffer no penalty for such silence. Moreover, such instruction in effect overrides the presumption of innocence with which every accused is clothed.

2. Right to Adequate Assistance of Counsel Denied.

When it was brought to the attention of the court prior to the commencement of the trial that a conflict of interest appeared between the two defendants rep-

resented by the same counsel that one of the defendants objected to the manner of handling of the case by such counsel and did not want to be represented by him, the court in denying the motion to be so relieved from representing such defendant placed both defendants in a position of relative compromise as to the handling of the case thereby denying to both defendants the right of proper representation. It is urged that this conflict was such and as developed by the evidence clearly disclosed itself to be such that full and proper representation of either defendant was not possible so that by the court's ruling the Constitutional rights of both of the defendants were denied.

3. **The Entrapment and "Deposit and Seizure" of Evidence on the Defendant Was Illegal, Rendering the Evidence Inadmissible.**

While not the common place "entrapment" situation nor the usual "search and seizure" transaction, nevertheless, the device whereby the FBI and State Police taking incriminating license plates and auto identification tags relating to a vehicle which had been reported stolen, from a person whom they had arrested and released in relation to auto theft and having that person momentarily place a bundle containing such items in the hand of a defendant who such party had called to meet him, when such defendant was not committing any offense nor in violation of any law and then seizing such defendant with planted paraphernalia the court allowing the same to be used as evidence against suh defendant to implicate him in crime without any showing of any other connection therewith was more offensive and repulsive than any true entrapment or any measure of unlawful search and seizure.

In essence the FBI and the police were shown to have schemed and devised a means of planting evidence not otherwise connected to a person on such person and instantly arresting him before he even received possession for the sole purpose of utilizing such evidence against him at court. The admission of such evidence was error and offends one's sense of justice.

4. **There was Unlawful Search and Seizure Rendering Evidence Seized Inadmissible.**

The Police had no reasonable or probable cause to further search the truck of defendant Roger Glavin, the registration and necessary papers having checked out and thus the searching of the truck in which defendant was riding and prior to arrest, violated the Constitutional right of defendant Roger Glavin against illegal search and seizure. The motion to suppress should have been granted and the evidence which was the product of such illegal search should not have been admitted.

5. **Admitting Hearsay Document Not Found in the Possession of the Defendant Against Whom Admitted and Without Any Foundation Connecting the Defendant Thereto was Prejudicial Error.**

The court by admitting a receipt for truck parts bearing a name similar to one of the names of defendant Chesney and gasoline charge tickets showing purchase of gasoline on a credit card bearing a name like that of defendant Chesney which were not obtained from the defendant Chesney nor otherwise connected up with him nor identified as relating to him was so prejudicial to defendant Chesney as to affect his substantial rights.

ARGUMENT.

I.

The Instruction That the Jury Could Infer Guilt From Possession of Recently Stolen Property Unless Such Possession Were Explained, Violated the Fifth Amendment and Abridged the Presumption of Innocence.

An accused is endowed with an overriding presumption of innocence which the law extends to every element of the crime charged.

Morrissetti v. United States, 342 U.S. 246, 72 S. Ct. 240.

The judiciary should not therefore improvise incriminating presumptions.

Morissetti v. United States, supra.

Even the Congressional power to facilitate conviction by substituting presumptions for proof is limited by the Fifth Amendment of the United States Constitution.

Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241.

It is expressly provided by Federal law that the failure of a defendant to testify shall not create any presumption against him.

18 U.S.C. §3481.

In fact the United States Supreme Court has long ago held that it is even reversible error not to instruct the jury that the failure of a defendant to request to testify shall not create any presumption against him.

Bruno v. United States, 308 U.S. 297, 60 S. Ct. 198.

It is embodied in our Constitution that one shall not be compelled in any criminal case to be a witness against himself.

U.S. Constitution, Fifth Amendment.

As stated in the case of *Malloy v. Hogan,* 378 U.S. 1 at page 8, 84 S. Ct. 489 at page 493

> ". . . the Fifth Amendment guarantees against Federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer the penalty . . . for such silence."

Moreover, a judge or prosecutor's comment on a defendant's failure to testify is reversible error.

Griffin v. State of California, 380 U.S. 609, 85 S. Ct. 1229.

The instruction given by the court to the jury, who are not skilled in the technicalities of the law, in essence amounted to a comment on the failure of the defendants to testify. Stripped of its technical aspects and given the common understanding which a juror would glean from the words used in the instruction, the effect of the same was to advise them that if there were any recently stolen items found in the possession of the defendants that the defendants had the burden of proving how the possession came to them and if the defendants did not give such an explanation that the jury was at liberty to infer guilt therefrom.

Such an instruction coupled with the planting of evidence not otherwise connected to a defendant in his hands and arresting him to use the same against him forced an inference of guilt unless the defendant chose

to give up his constitutional rights to remain silent.

What this instruction did was to force an election. The defendants were put to the choice of either taking the stand and testifying and explaining or attempting to explain in the case of Mr. Glavin the possession of the truck, and in the case of Mr. Chesney the unconnected material attempted to have been planted in his hands by the FBI and the police or to forfeit the right guaranteed by the Fifth Amendment to remain silent and suffer no penalty thereby.

Such instruction is contradictory to the instruction of a presumption of innocence and is contradictory to the instruction that a defendant does not have to testify. The jury obviously would consider this a specific instruction and the others general and that the court was giving them license to penalize the defendants for not testifying which obviously was the result in this case. It is submitted that the giving of instruction that possession of property recently stolen if not satisfactorily explained was a circumstance from which the jury could find that the defendants not only knew the property was stolen but also participated in the theft [Rep. Tr. p. 596, line 20 to p. 598, line 25], was prejudicial error.

II.

Appellants Denied Adequate Assistance of Counsel by Court's Ruling.

As pointed out herein [Supp. to Rep. Tr. pp. 1-2] prior to the commencement of the trial these appellants who were represented by one counsel brought to the attention of the court that a conflict of interest between them appeared; that appellant Glavin was unable

to agree with counsel on his representation and did not desire, in light of the conflicts that the same counsel continue to represent him. A motion was then made by counsel to be relieved from representing Mr. Glavin which motion was denied.

As this court is probably well familiar with, the final examination of proposed exhibits to be presented by the Government are not always available to counsel for the defendant until just before trial which was the fact in this case. It was after the examination of the proposed evidence and the final conference with the appellants on the weekend before appearing for trial on June 27, 1966, that such conflict of interest between the two defendants became clearly apparant. Therefore, this was the first opportunity that existed on the part of counsel to bring this to the attention of the court and to be relieved in a situation where there were conflicting interests.

It would not have substantially prejudiced the Government or any other one to have delayed the trial for a day or two so that independent counsel could represent defendant Roger Glavin and to avoid a situation where one counsel was attempting to represent two defendants who had conflicting interests.

It is submitted that the end result was a compromise with only limited representation—and not adequate—of each appellant.

In such a situation that existed, full consideration to the separate interests of each of the defendants could not be given. Balancing the right of one defendant against the other in such situation, it was not possible to evaluate whether one defendant should take the witness stand and testify as to facts and refute cer-

tain claimed inferences lest such testimony bring the conflict into open and tend to incriminate the other defendant.

There simply was no way that either of the defendants could or were adequately represented as always the interest of one had to be compromised lest the interest of the other be impaired. Certainly, this is not the "assistance of counsel" contemplated by the Sixth Amendment of the United States Constitution nor by the Rules recently laid down by our Supreme Court.

As the Supreme Court has recently said, the Constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client.

Anders v. State of California, Decided May 8, 1967, 87 S. Ct. 1396.

The same expression has been made by the Supreme Court in the case of:

Entsminger v. State of Iowa (also decided May 8, 1967), 87 S. Ct. 1402.

Assistance of counsel, whether demanded by the Fifth or Sixth Amendment must be effective assistance.

Henderson v. United States, 231 F. Supp. 177.

One is entitled to effective representation of counsel.

Powell v. State of Alabama, 287 U.S. 45, 53 S. Ct. 55.

It is hardly conceivable that there can be effective representation where there is a conflict of interest.

Moreover, an accused is entitled to the services of an attorney devoted solely to his interests.

MacKenna v. Ellis (CA Texas), 280 F. 2d 592.

The Supreme Court has stated that the desire on the part of an accused to have the benefit of undivided assistance of counsel of his own choice should be respected and thus where it is shown that there is possible conflict of interest between two defendants charged with a crime, to deny one defendant the benefit of undivided assistance of a counsel of his own choice is the denial of effective assistance of counsel guaranteed by the Sixth Amendment.

Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457.

It is, therefore, respectfully urged that in this situation prejudicial error was committed by the denial of the motion made to be relieved of representing Roger Glavin so that Roger Glavin could obtain the undivided assistance of a counsel of his own choosing where this was brought to the Court's attention before the trial commenced and at the earliest opportunity when it was possible so to do.

III.

Admission of Police Controlled Evidence, Planted by Them With Simultaneous Arrest for Use Against a Defendant Not Otherwise Connected Therewith and Who Was Committing No Offense Violated Defendant's Constitutional Rights and Was Error.

On May 2, 1966 the police after following a truck which they believed to have been stolen, arrested Leon Glavin, who was at the truck, and Bazil Buehler (who testified as a witness for the people in this case) who had accompanied him in another vehicle, for grand theft. [Rep. Tr. p. 294, lines 6-23; p. 295; p. 459, lines

8-14.] Mr. Buehler was later released. [Rep. Tr. p. 460, lines 8-11.]

On May 3, 1967, according to the testimony of Mr. Buehler, he received a telephone call from Mr. Chesney, who ran a machine shop in Glendale [Rep. Tr. p. 461, line 20; p. 463, line 10; p. 473, line 22; p. 474, lines 4-5] and who he knew was acquainted with Mr. Leon Glavin and his brother Roger Glavin (friends of Buehler), that Mr. Chesney asked him what had happened and he told him that he and Leon Glavin had been arrested for grand theft but that he had been released [Rep. Tr. p. 460, lines 8-11]; that Chesney said to him that Roger Glavin (Leon's brother) was there, that he didn't want to come over to Leon's house, and asked if he (Buehler) would get a package for him, that it was kind of important for him. [Rep. Tr. p. 460, lines 11-16.]

After the call from Mr. Chesney, he called the police officer who had participated in his arrest, told him about it. The officer told him to get the package and notify him. [Rep. Tr. p. 461, lines 7-12.]

Mr. Buehler testified that when he got home he told his wife he had to go over to Leon Glavin's house to get some stuff and take to Mr. Chesney's machine shop . . . that his wife told him Barbara, Leon's wife, had brought some things over earlier, that he looked in the sack and saw a couple of folders, a license tag and an aluminum plate. [Rep. Tr. p. 461, line 16, to p. 462, line 3.]

After checking the sack that had been left in his home by Barbara Glavin, he again contacted the police officer and enroute to Mr. Chesney's machine ship

met two officers and an FBI agent at a freeway turn-off near Colorado St. [Rep. Tr. p. 462 lines 11-21.]

The material in the sack was taken by the officers downtown to the police lab where it was photographed and labeled, taking two or three hours time. [Rep. Tr. p. 462, line 25, to p. 463, line 4; p. 485, lines 1-22.]

This was then returned to Mr. Buehler who proceeded to Mr. Chesney's place of business but no one was there so he contacted the officers and while officer Moeller was standing in the phone booth Buehler, at the direction of the police called Mr. Chesney at his home about 11:30 and made arrangement to meet Mr. Chesney at the bus terminal in North Hollywood. [Rep. Tr. p. 463, lines 9-21; p. 513, lines 14-24; p. 514, lines 23-24.]

The police and Buehler then proceeded to the location with the police and FBI agent keeping out of sight, that Mr. Chesney arrived about 12:15 A.M. and his car pulled up beside that of Mr. Beuhler, being about 5 to ten feet apart; Mr. Buehler opened the back of his car and handed the bundle (which he had now wrapped in a blue shirt) to Mr. Chesney; that Mr. Chesney then started to move back toward his car (5 to 10 feet away) whereupon the officers and FBI agent grabbed him and placed him under arrest before he had reached his car and took from him the bundle which Buehler had momentarily handed him. [Rep. Tr. p. 477, lines 13-24; p. 480, lines 19-22; p. 486, lines 3-25; p. 516, line 8, to p. 519, line 25.]

Officer Moeller who assisted in the arrest stated that Chesney never prior to the arrest opened any of the

envelopes in the bundle. [Rep. Tr. p. 519, lines 16-25.]

In this bundle which Buehler claims to have gotten from the wife of Leon Glavin were the objects which were admitted in evidence over the objection of Defendants (as recited in No. 3 of Specification of Errors herein) as Exhibits 14-B thru 14-I being a truck license plate, manila envelopes and small metal ID tags from a truck. [Rep. Tr. p. 491, line 8, to p. 510, line 7.] a truck. [Rep. Tr p. 491, line 8, to p. 510, line 7.]

It is strenuously urged that the procedure followed by the police in this situation was one which exceeds either entrapment—although having some of the attributes of entrapment—or unlawful search and seizure.

Here, and without challenging the veracity of Buehler whom they had arrested and released and who was working with them) the police took incriminating, evidentiary items obtained from a third—not shown to be reliable—source, and never shown to have ever been seen, possessed or been knowledgable to Chesney, retained possession of these and set up a ruse whereby Chesney was led to believe that he was receiving packages, the contents of which the police admit he never viewed, then arrested him for the obvious and sole purpose of using this police controlled evidence to tie him in to a crime with which he was not otherwise connected.

At the time of such arrest he was committing no offense and there was no reasonable or probable grounds for arresting him other than to have a basis by virtue of the material being placed in his hand, of arresting him for an offense with which it would ultimately ap-

pear to connect him. The material handed him was not a narcotic, lottery tickets or contraband, therefore, the colorable possession (the police at all times had possession) of the same would not and could not warrant an arrest.

This case is somewhat analogous to the situation in

Wong Sun v. United States, 371 U.S. 484, 83 S. Ct. 407,

where the police used an arrested and then released informer and admitted that they would not have found the drugs which they sought to attribute to Wong Sun if they had not obtained help from the arrested one. However, in that case, possession alone was a crime. Here, that is not the fact.

To justify an arrest and the planting of evidence solely for the purpose of utilizing that evidence to incriminate a person in connection with the crime for which he was not arrested certainly shocks the sense of justice.

The motion to suppress could not apply in this situation because Mr. Chesney never had possession of the items. Possession was always retained by the police who exercised complete dominion and control over the paraphernalia but led Chesney into the ring which they were supervising and let him touch the item momentarily under their surveillance solely to bring the fact of touching to the attention of the jury to attempt to incriminate him in connection with another crime.

The Fourth Amendment puts the courts of the United States and Federal officials in the exercise of their power and authority under the limitations and restraints which are forever sacred to the people that their

persons shall be secure against all unreasonable searches, and seizures under the guise of law.

Mapp v. Ohio, 367 U.S. 644, 81 S. Ct. 1684 imposes the same restriction on State officers.

It is obvious from the evidence and from the analysis of Mr. Buehler's testimony that Mr. Chesney was doing Mr. Glavin a favor by picking up a bundle for him from his brother. The police, however, utilized this, without any foundation showing a connection of Mr. Chesney with the items to give him momentarily colorable possession and then arrest him so that they could use the evidence to tie him into a crime with which he was not otherwise shown to have any connection.

The admission, therefore, of these items in evidence violated the Constitutional rights of this defendant and was error. The ruse and device employed exceed any procedure on entrapment. Evidence obtained by entrapment is not sanctioned.

Williams v. U.S. (C.A. Miss.), 311 F. 2d 441.

The error is multiplied in this case in that the colorable possession which the police projected on to Mr. Chesney of the tags and items relating to the truck [Exs. 14-B—14-I] combined with the jury instruction that the jury was entitled to infer from possession alone of recently stolen property that the defendant was guilty, effectively wiped out the presumption of innocence and created through this evidence and instruction a presumption of guilt, which the jurors, being untrained in the niceties of the law, would find great difficulty in disregarding.

It is significant that when the objection was made that the items had never been in the possession of Mr.

Chesney [Rep. Tr. p. 499, lines 1-20] the court stated that the situation was the same thing as narcotics, that once delivery was made that was it and that was the ground for overruling the objection. [Rep. Tr. p. 499, lines 21-25.]

Looking then to narcotic cases (which appellants feel are not entirely comparable due to the fact that possion of the same alone is an offense which is not the situation here), the Supreme Court of California in the case of:

People v. Gory, 28 Cal. 2d 450, 170 P. 2d 433,

has clearly set forth that the word "possession" means an "immediate and exclusive possession and one under the dominion and control of defendant".

Here, the defendant never had dominion or control. This at all times was retained by the police without ever an intent that the defendant should have or exercise any possession or control. All that the police wanted was that the evidence which they had should give the "appearance" of possession so that this might be used against the defendant.

IV.

The Unlawful Search Prior to Arrest and Seizure Rendered Evidence Taken From Roger Glavin Inadmissible.

On May 3, 1966, Lyman C. Ross, an employee of the National Automobile Theft Bureau saw a truck bearing the same color combination as the tractor which had been recovered on a previous day after having been stolen and he radioed an officer of the Highway Patrol who then followed the truck and when it stopped at a weighing station at the scales where the officer ordered

it to be driven over to an area for parking, the officer held the truck there and under his authority, the agent put on his coveralls and then started searching and examining the truck.

Prior to this, the officer had checked the registration and papers of the truck and found that they were in order. Mr. Ross, in the course of his checking and searching, claims to have discovered a number on the cab of the vehicle which corresponded to a number of one which had been reported stolen and then the driver of the truck, Mr. Rexius and the person who was with him, Mr. Roger Glavin, were thereupon arrested. [Rep. Tr. p. 108, line 18, to p. 112, line 20; p. 280, lines 9-22.]

The officer stated on cross-examination that the information upon which he made the arrest was that Mr Ross who was searching the vehicle under the officers surveillance showed him a brass plate in the cab which corresponded with a number he had in a notebook. [Rep. Tr. p. 284, lines 12-17.]

It is obvious, therefore, that the police held defendant Glavin and his driver while Mr. Ross who had put on his coveralls made a search and then based upon the result of that search an arrest was made.

It is a well established principle of law that a search cannot be justified by what it turns up.

> *People v. Pereda,* 229 Cal. App. 2d 814, 40 Cal. Reptr. 566.

Moreover, arrest without a warrant must stand upon firmer ground than mere suspicion.

> *Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407.

If it is necessary to rely on a search to justify the arrest, the conclusion is inescapable that a search cannot justify the arrest because of the products thereof.

People v. Brown, 45 Cal. 2d 640, 290 P. 2d 528.

The law of the place where arrested determines the validity of search in absence of applicable Federal statutes.

United States v. Dyer, 332 U. S. 581, 68 S. Ct. 222.

This Court has ruled in effect that a search of automobile without a warrant prior to arrest when not made for the purpose of protecting the officers against weapons was illegal and violated the Fourth Amendment rights of the defendant.

Mosco v. United States, 301 F. 2d 180 (Ninth Circuit 62).

Common rumor or report, suspicion or even strong reason to suspect is not adequate to support a warrant for arrest. Thus, where officers investigating theft of interstate shipment of whiskey observed defendant loading cartons into automobile, it was held that they accomplished an arrest when they stopped the defendant's vehicle and they did not have probable cause at the time to arrest without a warrant. Thus, the search instant thereto was also unlawful.

Henry v. United States, 361 U. S. 98, 80 S. Ct. 168.

This case also holds that an arrest is not justifiable by what a subsequent search discloses.

It is therefore respectfully submitted that the motion to suppress should have been granted and the evidence admitted which was obtained from the vehicle searched at the Ventura Weighing Station was improper.

V.

The Admission of Hearsay Documents Not Found in Possession of Defendant or Connected Up Was Prejudicial Error.

As pointed out in Item 2 of specification of errors, the court admitted in evidence Government Exhibit 9-A which was a receipt for purchase of truck parts having the name of "Chesney Truck" on it. [Rep. Tr. p. 298, lines 18-19; p. 343, lines 10-19.]

The court also erred in admitting in evidence over objection the Government's Exhibit 12-E (Specification of Error No. 1.) [Rep. Tr. p. 422, lines 3-23.]

These documents were not found in the possession of Mr. Chesney, were not connected up in any way with Mr. Chesney. The first item, Exhibit 9-A was a receipt for truck parts in the name of Chesney Trucking.

The only conclusion the jury could have drawn from such hearsay evidence was that intended by the Government that Mr. Chesney was the person referred to on such receipt. No evidence was brought in to support this and there was no foundation laid for the introduction of this hearsay evidence.

Exhibit 12-E consisted of receipts for gasoline charged to Robert L. Chesney. These were taken from the truck at the Ventura Weighing Station as a result of the search to which objection was made and to which a motion to suppress was made.

There was no foundation to show that such charges were made with the knowledge, permission or consent of defendant Robert L. Chesney. The effect of this hearsay evidence was simply to accuse the defendant

without any foundation and to use evidence obtained from one defendant in a case not involving a conspiracy as some form of an admission against another.

In order to introduce in evidence a paper or document connecting up a defendant, some foundation must be laid showing that connection. Thus, it was held in this same court that the court erred in admitting in evidence a paper which a Government agent had obtained from the office files of a defendant which allegedly showed an intent to evade taxes where there was no proof of the genuineness or who wrote it and was not made in the regular course of defendants business.

Wolcher v. U.S., 200 F. 2d 493.

A private writing document or paper can only be admitted where there is extensive proof of identity and genuineness as the writing does not prove itself.

Hartzell v. U.S. (C.C.A. Iowa) 72 F. 2d 569.

Evidence raising merely suspicion or conjecture is not sufficient.

Harzell v. U.S., supra.

Conclusion.

For the reasons set forth herein, appellants respectfully urge that the judgments and conviction of the appellants should be reversed.

Respectfully submitted,

G. G. Baumen,
Attorney for Appellant.

Certificate.

I certify that in connection with the preparation of this brief I have examined Rule 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

G. G. Baumen

EXHIBIT A.

Index of Exhibits

	No.	Marked	Rec'd
Govt's	1	11	16
	2	31	36
	4-a	50	54
	4-b	50	58
	4-c	50	57
	4-d	50	62
	12-a	114	114
	5	159	164
	3a	169	169
	3b	169	169
	3c	169	169
	3d	169	193
	3e	169	169
	3f	169	169
	3g	169	169
	3h	169	213
	7a	222	240
	7b	222	240
	7c	222	240
	7d	222	240
	9a	289	343
	9b	289	300
	9c	289	304
	9d	289	306
	9e	289	307
	9f	289	308
	9g	289	330

	No.	Marked	Rec'd
Govt's	9h	289	336
	9i	289	310
	9j	289	311
	9k	289	314
	9L	289	315
	9m	289	320
	9n	289	323
	10	359	359
	11a	357	402
	11b	399	404
	11c	379	405
	12a	398	410
	12b	398	417
	12c	398	417
	12d	398	417
	12e	398	419
	12f	398	423
	12g	398	425
	12h	398	428
	12i	398	428
	12j	398	429
	12k	398	430
	12L	398	432
	12m	398	435
	12n	398	420
	13	398	441
	14a		
	14b	455	495
	14c	454	500
	14d	454	503

	No.	Marked	Rec'd
Govt's	14e	454	503
	14f	454	503
	14g	483	505
	14h	483	510
	14i	483	510
	15	526	526
	16	526	526
	17	526	526
	17a	538	581
	17b	538	581
	17c	538	581
	16a	538	
	16b	538	
	16c	538	
	18a	543	
	18b	543	
	18c	543	